LEO RHEA PARTNERSHIP

IBLA 83-540 Decided March 27, 1984

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring null and void ab initio mining claims UMC 258878 through UMC 258880 (Fir Fraction Nos. 8 through 10).

Reversed.

1. Regulations: Applicability

An administrative regulation will not be construed to operate retroactively unless the intention to that effect unequivocally appears.

2. Applications and Entries: Filing--School Lands: Indemnity Selections--Segregation--State Selections

Prior to the promulgation of 43 CFR 2091.2-6, the filing of a state indemnity selection application did not segregate the identified lands from operation of the mining laws prior to classification of the lands as suitable for indemnity selection.

APPEARANCES: Rosemary J. Beless, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Leo Rhea Partnership appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated March 17, 1983, declaring null and void ab initio mining claims UMC 258878 through UMC 258880, also identified as Fir Fraction Nos. 8 through 10. These claims were located on September 10, 1982, in secs. 10 and 15, T. 2 S., R. 4 E. Salt Lake meridian, Summit County, Utah. BLM records show that these lands were listed in an indemnity selection application, SS 1291, filed by the State of Utah on October 21, 1966. The BLM decision held these lands were segregated from mineral entry because of the State's application.

Leo Rhea Partnership asserts in its statement of reasons that the indemnity selection application insufficiently identifies the lands and is therefore defective and void. Consequently, appellant argues, it does not segregate the lands from mineral entry. In its answer, BLM denies the asserted impropriety of the description, but concedes that the regulation providing for segregation of the land from location of mining claims upon the

filing of a State indemnity selection, 43 CFR 2091.2-6, was not promulgated until long after Utah's application was filed. BLM has requested that the case be remanded.

[1] The key issue presented is whether, as of the date when the subject mining claims were located, the lands in question were effectively segregated by the presence of application SS 1291.

Current Departmental regulation, 43 CFR 2091.2-6, provides that upon filing of such an application the lands described are automatically segregated from "settlement, sale, locations or entry under the public land laws, including the mining law," for the specified period. 1/ This regulation was promulgated in 1981 in order that the lands selected would be protected from entry during the processing of the application. See 46 FR 38508 (July 28, 1981); 46 FR 24139 (Apr. 29, 1981). Prior to this, no definitive Departmental regulation existed pertaining to segregation of lands listed in a state indemnity selection application filed pursuant to 43 U.S.C. § 851 (1976). See 43 CFR Subpart 2091 (1980). 2/

A question arises whether this regulation applies to selections filed prior to its effective date, August 27, 1981. Neither the language employed in 43 CFR 2091.2-6 nor its precedent administrative rulemaking manifests any intent to make the promulgation retroactive to include pending applications. Moreover, BLM's Information Memorandum No. 81-257 is indicative that BLM has adopted the position that the segregative effect is only to be operative prospectively upon subsequently filed applications or applications with respect to which notice of segregative effect is published after August 27, 1981. 3/ We must, therefore, conclude that SS 1291 did not segregate the land from mining location under 43 CFR 2091.2-6.

[2] Since BLM did not specify the rationale behind its conclusion that the State's application segregated the lands, we next consider the effect of such an application filed in 1966. The General School Land Indemnity Act of 1891, as amended, 43 U.S.C. §§ 851, 852 (1976), authorizes the selection by a state of unappropriated public land which is not mineral in character in lieu of originally designated sections where those sections are otherwise disposed of by the United States. The Department held in State of Arizona, 55 I.D. 249 (1935), that the filing of an indemnity school land selection prior to November 26, 1934, had the same segregative effect as other types of

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1/ The segregative effect of the application expires 2 years after the filing of the application in the absence of administrative appeals regarding the land status. 43 CFR 2091.2-6.

2/ This may be contrasted with 43 CFR 2091.6-4 and 43 CFR 2627.4(b), where filing of a selection application by the State of Alaska effectuates a segregation from all appropriation.

3/ Information Memorandum No. 81-257 promulgated by BLM reads in part: "The regulations do not apply retroactively to applications currently pending or filed before August 27, 1981. If segregation is appropriate for these applications, it will be necessary to publish notice of such applications. The segregation can only be effective on or after August 27, 1981." Counsel for BLM concedes that no notice of SS 1291 has been published subsequent to promulgation of the regulation.

land entries, withdrawing the land from appropriation by later applications. However, such selections made after that date were drastically affected by the general withdrawal of public lands accomplished through Exec. Order Nos. 6910 and 6964 on November 26, 1934, and February 5, 1935, respectively. Under section 7 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315f (1976), the Secretary is authorized to determine in his discretion whether these withdrawn lands are suitable for disposition. Until he has done so, public lands desired to satisfy state indemnity needs are unavailable. As a result, a state indemnity selection application was treated by the Department as merely a petition for classification and entitled the applicant to nothing more than to have the application considered. State of Utah, 71 I.D. 392 (1964); State of California, 67 I.D. 85 (1960). However, section 7 of the Taylor Grazing Act specifically provided that locations and entries under the mining laws may be made upon lands withdrawn in aid of classification. 43 U.S.C. § 315f (1976). Thus, prior to classification of the land and approval of the selection, alternative disposition of the land was not prevented and other interests could vest.

BLM, through its counsel, states that its records "do not indicate any classification or other action regarding SS 1291 which would have segregated the lands prior to September 10, 1982." As a result, we conclude that the lands identified in SS 1291 were not segregated from the operation of the mining laws at the time appellant located the subject mining claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Franklin D. Arness
Administrative Judge